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8 UNITED STATES DISTRICT COURT
9 CENTRAL DISTRICT OF CALIFORNIA – WESTERN DIVISION
10

11 HAIG KELEDJIAN, as TRUSTEE for the
12 AMIRIAN EDUCATIONAL TRUST and as
REPRESENTATIVE of the BENEFICIARIES of
13 the AMIRIAN EDUCATIONAL TRUST, the
REAL PARTIES and SUCCESSORS IN
14 INTEREST OF SEBOUH AMIRIAN, now
deceased,

15 Plaintiff,

16 v.

17 NATIONSTAR MORTGAGE, LLC, a limited
liability corporation, NBS DEFAULT
18 SERVICES, LLC, a limited liability company,
and DOES 1 through 50,
19

20 Defendants.

Case No. 2:15-cv-01281-SJO-AS

MEMORANDUM OF POINTS AND
AUTHORITIES IN OPPOSITION TO
DEFENDANT NATIONSTAR'S MOTION TO
DISMISS

Assigned to Hon. S. James Otero

Date: April 13, 2015
Time: 10:00 a.m.
Courtroom: 1

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MEMORANDUM OF POINTS AND AUTHORITIES

I. Introduction.

In this action, Plaintiff Haig Keledjian, as Trustee for the Amirian Educational Trust, and as Representative of the Beneficiaries of the Amirian Educational Trust, the Successors in Interest of Sebouh Amirian ("Plaintiff") filed a Complaint alleging inter alia, that (i) Defendants violated the California Homeowner's Bill of Rights ("HBOR") under California Civil Code (Cal. Civ. Code) section 2923.6 by improperly proceeding with a dual-tracking the foreclosure action while a loan modification was still pending, (ii) Plaintiff is entitled to injunctive relief under Cal. Civ. Code section 2924.12; and (iii) Defendants engaged in unfair competition within the meaning of California Business and Professions Code section 17200 et seq.

Specifically, the Complaint alleges that Defendants, including Nationstar Mortgage, LLC ("Nationstar"), initiated foreclosure proceedings against Plaintiff by improperly causing a Notice of Default to be recorded against Plaintiff's real property located at 5602 Bramblewood Road, La Canada Flintridge, California 91011 (the "Subject Property"). Under the HBOR, mortgage servicers are prevented from taking any actions, including the filing of a Notice of Default, until the mortgage servicer has made a final, written decision on a loan modification application or appeal, and at least 31-days have passed from the date of the written denial. Cal. Civ. Code §2923.6(c) and § 2923.6(e)(1).

Nationstar now brings a motion to dismiss Plaintiff's causes of action for failure to state a claim against Nationstar upon which relief may be granted. The Court should deny Nationstar's motion to dismiss. Plaintiff has standing because Plaintiff may bring claims under the HBOR on behalf of the original borrower, Sebouh Amirian, as executor of the estate of Sebouh Amirian. Furthermore, even if Plaintiff were statutorily ineligible to assert claims under the HBOR, Plaintiff would still have standing under the equitable estoppel doctrine.

II. Factual Background

In or around 2004, Mr. Sebouh Amirian purchased the Subject Property and financed the Subject Property through a mortgage secured by a Deed of Trust with Security Pacific Home Loan. (Compl. ¶ 10.) Mr. Amirian transferred the Subject Property to the Amirian Educational Trust of December 28,

1 1998 (the “Trust”) in or around November 22, 2004. (Compl. ¶ 11.) Plaintiff is the Trustee for the Trust
2 and is given broad authority to manage the assets of the trust, including but not limited to, the authority
3 to sell, convey, manage, and encumber the trust assets, as well as authority to commence or defend
4 litigation relating to any trust assets and property. (Compl. ¶ 12.) As the Trustee, Plaintiff represents
5 Plaintiff’s children, G Gregory Keledjian, Serena Keledjian and Alexander Keledjian, the real parties
6 and successors in interests of the Trust. (Keledjian Decl. ¶ 6.) Mr. Amirian was Plaintiff’s father-in-
7 law. (Keledjian Decl. ¶ 3.)

8 Since the date of purchase, the Subject Property has been occupied by Mr. Amirian, Plaintiff, his
9 spouse, and their family as their principal family residence. (Compl. ¶ 13.) Mr. Amirian passed away in
10 2013. During this time, the Subject Property began to accrue arrears as the mortgage payments had been
11 delayed. (Compl. ¶ 14.) In or around September 2013, after Mr. Amirian’s passing, Plaintiff contacted
12 Bank of America, N.A. (“Bank of America”) which serviced the loan at the time, in order to apply for a
13 loan modification on the Subject Property. Plaintiff was informed by Bank of America’s agents that the
14 arrears on the loan were approximately \$85,000.00 and that, in order to be considered for a loan
15 modification, Plaintiff would be required to reduce the arrears by making a payment of at least
16 \$50,000.00. (Compl. ¶ 14-15.) On or around September 19, 2013, Plaintiff sent Bank of America a
17 check in the amount of \$50,000.00 as instructed. Bank of America accepted and cashed the funds from
18 Plaintiff’s check. (Compl. ¶ 16.) Plaintiff also sent a second check in the amount of \$6,511.64 for the
19 mortgage payment due for the following month. Bank of America accepted the check and applied it
20 towards the Subject Property’s mortgage payment. (Compl. ¶ 17.)

21 Plaintiff contacted Bank of America in or around January 2014 to inquire about applying for a
22 loan modification and learned at this time that the mortgage had been transferred to Nationstar. (Compl.
23 ¶ 18.) In or around January 2014, Plaintiff contacted Defendant Nationstar who provided a loan
24 modification application telephonically, which Plaintiff completed and submitted. Nationstar confirmed
25 to Plaintiff that the loan modification application was completed in full and was pending a decision.
26 (Compl. ¶ 19.)

27 In or around mid-February 2014, Plaintiff received a notice dated February 4, 2014 (the
28 “Notice”) stating that Nationstar had denied his loan modification application due to equity in the

1 Subject Property. (Compl. ¶ 20.) Nationstar instructed Plaintiff that, if he wished to appeal this denial,
2 Plaintiff would need to submit a written request, supporting documents, and payment to complete a
3 formal appraisal of the Subject Property. (Compl. ¶ 20.) The Notice further stated that “[t] he estimated
4 cost of an appraisal in your community is \$350.00. If you wish to exercise this option, we must, within
5 30 calendar days of this notice, receive a written request that includes your estimate of the property
6 value and a reasonable basis for that estimate, along with any other input values you wish to dispute, and
7 a check for \$200 as a deposit against the full cost of the appraisal.” (Compl. ¶ 20.) The Notice stated
8 that Nationstar would notify Plaintiff of whether an appraisal would be ordered. If an appraisal is not
9 ordered, the \$200 will be applied to Plaintiff’s account. The notice further indicated that “[no]
10 foreclosure sale will be conducted and you will not lose your home during this 30-day period (or any
11 longer period required for us to review supplemental material you may have provided in this Notice.)”
12 (Compl. ¶ 20.)

13 In or around March 3, 2014, within 30-days of the Notice, Plaintiff exercised his options in
14 writing and applied for an appeal of the loan modification denial. (Compl. ¶ 21.) As part of the appeal
15 process, Plaintiff provided Nationstar with a check in the amount of \$200.00 towards the appraisal costs
16 and additional supporting documentation of the Subject Property’s equity. (Compl. ¶ 21.) Plaintiff was
17 informed and believed that no “foreclosure sale will be conducted” during the “period required for
18 [Nationstar] to review the supplemental materials” as specified by the Notice. (Compl. ¶ 21.)

19 After submitting the required documents, Plaintiff waited for a determination from Nationstar.
20 (Compl. ¶ 23.) Despite following up with Nationstar, Plaintiff did not receive any indication that the
21 loan modification appeal had been denied. (Compl. ¶ 23.) Plaintiff did not receive any written notices
22 that the loan modification appeal had been denied. (Compl. ¶ 23.) Throughout this period, Nationstar
23 made no requests for any additional documentation from Plaintiff and did not inform Plaintiff that the
24 appeal was incomplete or insufficient. (Compl. ¶ 23.)

25 On or around October 21, 2014, while the loan modification appeal was still pending, Nationstar
26 through Defendant NBS, caused a Notice of Default to be recorded against on the Subject Property and
27 improperly commenced foreclosure proceedings against the Subject Property. (Compl. ¶ 24.) Plaintiff
28 did not receive any notification that the appeal had been denied. (Compl. ¶ 24.)

1 In or around December 2014, Plaintiff again contacted Nationstar for status on the loan
 2 modification appeal. (Compl. ¶ 25.) Although the Notice of Default was already recorded, Nationstar's
 3 agents still informed Plaintiff to wait for a decision letter that would be mailed out shortly thereafter
 4 with its decision the appeal. (Compl. ¶ 25.) Plaintiff never received a written notice or decision from
 5 Nationstar who, instead, only returned the \$200.00 appraisal check to Plaintiff. (Compl. ¶ 25.)

6 Plaintiff received at least three financial statements from Nationstar, addressed to the "Estate of
 7 Sebouh Amirian," dated November 2014, December 2014, and January 2015 which documented
 8 Nationstar's receipt and handling of the \$200.00 appraisal check. (*See Notice of Pleadings Filed*,
 9 Docket No. 4 at pg 190.)

10 ***III. Argument.***

11 ***1. Plaintiff May Bring Claims Under the HBOR on Behalf of Original Borrower Sebouh*** 12 ***Amirian as Executor of the Estate of Sebouh Amirian***

13 Under the HBOR, a borrower is defined as "any natural person who is a mortgagor or trustor and
 14 who is potentially eligible for any federal, state, or proprietary foreclosure prevention alternative
 15 program offered by, or through, his or her mortgage servicer." Cal. Civ. Code § 2920.5. Thus, Mr.
 16 Sebouh Amirian would qualify as a "borrower" and could bring a claim under the HBOR as the original
 17 mortgager eligible for Nationstar's loan modification program. In its motion to dismiss, Nationstar
 18 argues that because Plaintiff, and not Mr. Amirian, brought claims against Nationstar, Plaintiff's causes
 19 of action should be dismissed because Plaintiff is not a "borrower" under Cal. Civ. Code § 2920.5.

20 An estate or a trust is not a legal entity, therefore, it does not have the capacity or standing to sue.
 21 Rather, title to the estate and trust assets, are held by the executor, administrator, or trustee, on behalf of
 22 the beneficiaries. An executor may sue in their own names without joining the person for whose benefit
 23 the action is brought. See Fed. R. Civ. P. 17(1).

24 Here, the mortgagor to the original Deed of Trust was Mr. Amirian. As indicated on its own
 25 documents, Nationstar has corresponded with Plaintiff regarding the loan modification application in
 26 Plaintiff's capacity as a representative of the "Estate of Sebouh Amirian." Plaintiff is the trustee of the
 27 Trust, and became the executor of Mr. Amirian's estate after his passing. Consequently, Plaintiff has the
 28 right to bring a suit on behalf of Mr. Amirian's estate. The authority presented by Nationstar does not

1 contemplate wherein the original borrower subsequently becomes deceased, and Nationstar does not
 2 address Plaintiff's fiduciary right to bring a HBOR claim on behalf of the estate of Mr. Amirian.

3 **2. *Even if Plaintiff Were Statutorily Ineligible to Assert HBOR Claims, Plaintiff Has***
 4 ***Standing Under the Equitable Estoppel Doctrine***

5 At all times in this case, Nationstar and its predecessors in interest have, by their statements and
 6 conduct, led Plaintiff to believe that he was a borrower for the purposes of considering him for a loan
 7 modification. Relying on these statements and conduct, Plaintiff sent a \$50,000.00 check in the amount
 8 of \$50,000 on September 19, 2015 to qualify for a loan modification. Since January 2014, when
 9 Plaintiff submitted his initial loan modification application to Nationstar, Nationstar has treated Plaintiff
 10 as a borrower eligible for a loan modification. Nationstar accepted, reviewed, and denied Plaintiff's
 11 loan modification. Nationstar further notified Plaintiff in writing that Plaintiff had the ability to appeal
 12 his denial, and instructed him to submit a written request, supporting documents, and payment to
 13 complete a formal appraisal of the Subject Property. The Notice evidenced an attempt by Nationstar to
 14 comply with the provisions of the HBOR, by indicating that "[no] foreclosure sale will be conducted and
 15 you will not lose your home during this 30-day period (or any longer period required for us to review
 16 supplemental material you may have provided in this Notice.)" Plaintiff complied with Nationstar's
 17 appeal requirements and provided Nationstar with a check in the amount of \$200 to complete the appeal.

18 The general doctrine of equitable estoppel has been codified in California Evidence Code section
 19 623: "Whenever a party has, by his own statement or conduct, intentionally and deliberately led another
 20 to believe a particular thing true and to act upon such belief, he is not, in any litigation arising out of
 21 such statement or conduct, permitted to contradict it." Cal. Evid. Code § 623. Similarly, the 9th Circuit
 22 has applied equitable estoppel upon a showing that its traditional elements are met: (1) the party
 23 estopped knows the facts; (2) the party [to be estopped] intends that his or her conduct will be acted on;
 24 (3) the claimant must be ignorant of the true facts; and (4) the claimant must detrimentally rely on the
 25 other party's conduct. *Salgado-Diaz v. Gonzales*, 395 F.3d 1158, 1166 (9th Cir. 2005).

26 Other federal circuit courts have accepted equitable estoppel arguments to allow plaintiffs to
 27 assert claims despite facial statutory ineligibility. One example of this is in the context of extending
 28 Family Medical Leave Act ("FMLA") protections to otherwise ineligible employees. For instance, in

1 *Reaux v. Infohealth Management Corp.*, Reaux, the plaintiff, requested FMLA leave for the impending
 2 birth of a child. Although the Reaux conceded that she was statutorily ineligible for FMLA leave due to
 3 her workplace having fewer than 50 employees within 75 miles, Reaux alleged that the defendant, her
 4 employer, told her she would be eligible for FMLA leave if she filled out the proper paperwork. Reaux
 5 took her leave and was subsequently terminated. Reaux filed a complaint, and defendant filed a motion
 6 to dismiss, citing Reaux's ineligibility under the FMLA. The Court denied the defendant's motion to
 7 dismiss, finding that Reaux had properly pled the requirements for asserting equitable stoppel – a
 8 misrepresentation by the employer, reasonable reliance on the misrepresentation, and detriment caused
 9 by such reliance. *See Reaux v. Infohealth Management Corp.*, No. 08-C-5068, 2009 BL 48247 (N.D. Ill.
 10 Mar. 10, 2009). The Second, Fifth, and Eighth Circuits have all explicitly accepted equitable estoppel
 11 arguments to prevent employers from asserting an employee's statutory ineligibility to defend FMLA
 12 claims. *See, e.g., Kosakow v. New Rochelle Radiology Assocs., P.C.*, 274 F.3d 706 (2d Cir. 2001);
 13 *Minard v. ITC Deltacom Commc'ns, Inc.*, 447 F.3d 352 (5th Cir. 2006); *Duty v. Norton-Alcoa*
 14 *Proppants*, 293 F.3d 481 (8th Cir. 2002).

15 In our case, Nationstar knew that Mr. Amirian was the original borrower and that he was
 16 deceased. Yet Nationstar reviewed and processed Plaintiff's loan modification application, treating
 17 either or both Plaintiff and the "Estate of Sebouh Amirian" as a borrower. Nationstar led Plaintiff to
 18 believe that no foreclosure would be pursued and that Plaintiff would be protected by the HBOR while
 19 Nationstar reviewed Plaintiff's appeal. Plaintiff relied on this to his detriment, and Nationstar went
 20 forward with foreclosure proceedings regardless. Even if the Court finds that Plaintiff would be
 21 otherwise statutorily ineligible to bring his claim, Plaintiff should be allowed to assert equitable estoppel
 22 on these facts in order to prevent injustice and effectuate the intent of legislature to protect homeowners
 23 and families.¹ Furthermore, to the extent that Nationstar and other mortgage servicers have a common

24 ¹ On February 9, 2015, a bill to amend the statutory definition of "borrower" was introduced in the
 25 California Legislature, which if ultimately enacted would clarify the definition to include the "successor
 26 in interest to the mortgagor or trustor following the death for the mortgagor or trustor," and defines
 27 "successor in interest" as a "natural person who provides the mortgage servicer with notification of the
 28 death of the mortgagor or trustor and reasonable documentation showing that the person ... [t]he
 personal representative ... of the mortgagor's or trustor's estate." *See Assemb. B. 244*, 2015-2016 Reg.
 Sess. (Cal. 2015). Although not yet enacted, this bill evidences the intent of legislature to afford HBOR
 protections and claims to representatives of a mortgagor's estate in so-called "widows and orphans"
 scenarios.

1 practice of considering representatives of the estates of deceased borrowers for foreclosure alternatives
 2 and misrepresenting protections afforded to them, the availability of an equitable estoppel argument
 3 becomes more salient. Finally, it is worth noting that the equitable estoppel argument was not argued by
 4 plaintiffs in any of the cases cited by Nationstar.

5 On February 13, 2015, and prior to removal of the case to this district, the state trial court
 6 accepted Plaintiff's equitable estoppel argument and granted Plaintiff's application for a temporary
 7 restraining order prohibiting and enjoining Nationstar from further conducting further foreclosure
 8 procedures on the Subject Property. (*See Notice of Pleadings Filed*, Docket No. 4 at pg 169.) Although
 9 the Court is not bound by this decision, the Court has discretion to apply the law of the case doctrine and
 10 allow Plaintiff to assert the equitable estoppel argument in order to maintain consistency and avoid
 11 reconsideration. *See Pit River Home and Agr. Co-op Ass'n v. U.S.*, 30 F.3d 1088 (9th Cir. 1994).

12 **3. Nationstar's Cal. Civ. Code §2923.6(g) Preclusion Argument Relies on Document Not**
 13 **Subject to Judicial Notice.**

14 Nationstar argues that Plaintiff's claims are precluded by the fact that Mr. Amirian was
 15 previously considered and afforded a loan modification pursuant to Cal. Civ. Code § 2923.6(g). To
 16 establish this argument, Nationstar asks the Court to take judicial notice of a purported loan modification
 17 agreement identified as RJN, Exhibit "6."

18 The Federal Rules of Evidence state that "[a] court may judicially notice a fact that is not subject
 19 to reasonable dispute [if] it: (1) is generally known within the trial court's territorial jurisdiction; or (2)
 20 can be accurately determined from sources whose accuracy cannot reasonably be questioned." Fed. R.
 21 Evid. 201(b). The touchstone for judicial notice is that the fact be capable of independent verification *as*
 22 *indisputably true*. *See, e.g., Jespersen v. Harrah's Operating Co., Inc.*, 444 F.3d 1104, 1110 (9th Cir.
 23 2006) (explaining that judicial notice requires a "high degree of indisputability") (quoting Fed. R.
 24 Evid. 201 advisory committee notes). Furthermore, a necessary—and elementary—first step, in other
 25 words, is that any evidence demonstrating a fact must be properly authenticated. *See* Fed. R. Evid.
 26 901(a) (setting forth "the requirement of authenticating or identifying an item of evidence").

27 RJN, Exhibit "6" has not been authenticated, is not generally known within the court's
 28 jurisdiction, and cannot be accurately determined from sources whose accuracy cannot reasonably be

1 questioned. Consequently, it not subject to judicial notice and Nationstar's preclusion argument fails for
2 lack of support.

3 ***IV. Conclusion.***

4 For the foregoing reasons, Nationstar's motion to dismiss for failure to state a claim premised
5 upon Plaintiff's lack of standing should be denied. However, should the Court be grant Nationstar's
6 motion to dismiss, Plaintiff respectfully requests that the Court also grant Plaintiff leave to amend the
7 Complaint to more clearly allege his equitable estoppel argument and his capacity to bring his claim on
8 behalf of the estate of Mr. Amirian.

9
10 Dated: March 30, 2015

JAURIGUE LAW GROUP

11 /s/ Nam H. Le

12 Michael J. Jaurigue

13 David Zelenski

14 Nam H. Le

Attorneys for Plaintiff

PROOF OF SERVICE

I am employed in the County of Los Angeles; I am over the age of eighteen years and am not a party to the within action; and my business address is 114 North Brand Boulevard, Suite 200, Glendale, California 91203.

On **March 31, 2015**, I served the document(s) described as **MEMORANDUM OF POINTS AND AUTHORITIES IN OPPOSITION TO DEFENDANT NATIONSTAR'S MOTION TO DISMISS** on the party (or parties) in this action by delivering a true copy (or copies) addressed as follows:

NBS Default Services, LLC
c/o Buckley Madole P.C.
301 E. Ocean Drive, Suite #1720
Long Beach, California 90802

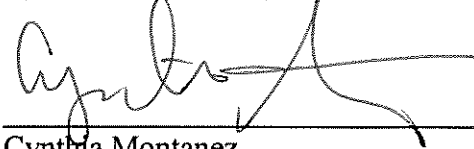
Nationstar Mortgage, LLC
c/o Green and Hall APC
1851 East First Street 10th Floor
Santa Ana, CA 92705

XXX BY U.S. MAIL: I am readily familiar with the firm's practice of collection and processing correspondence for mailing. Under that practice, an envelope (or envelopes) containing the document(s) would be deposited with the U.S. Postal Service on that same day, with postage thereon fully prepaid, at Glendale, California in the ordinary course of business. I am aware that, on motion of the party served, service is presumed invalid if the postal-cancellation date or postage-meter date is more than one day after the date of deposit for mailing.

☐ **BY OVERNIGHT DELIVERY:** I enclosed the document(s) in an envelope (or envelopes) or package (or packages) provided by an overnight-delivery carrier and addressed to the person(s) at the address(es) above. I placed the envelope(s) or package(s) for collection and overnight delivery at an office or a regularly utilized drop-box of the overnight-delivery carrier.

☐ **BY HAND DELIVERY:** I caused an envelope (or envelopes) containing the document(s) to be delivered by hand to the office(s) of the addressee(s).

I declare under penalty of perjury under the laws of the State of California and the United States that the foregoing is true and correct. Executed on **March 31, 2015**, at Glendale, California.


Cynthia Montanez